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**IN THE UNITED STATES DISTRICT COURT OF GUAM  
TERRITORY OF GUAM**

## **CESS NAVARRO OLMO and RONNIE PASCUAL FERRERAS.**

CIVIL CASE NO. 05-00025

## Plaintiffs.

vs.

**A. P. GREEN INDUSTRIES, INC., et al.,**

**PLAINTIFFS' OPPOSITION TO MOTIONS  
TO DISMISS FOR LACK OF PERSONAL  
JURISDICTION AND FOR IMPROPER  
VENUE**

## Defendants.

In an Order filed December 15, 2005, the Court set a hearing for January 17, 2006, on motions to dismiss for lack of personal jurisdiction and improper venue.

All of the Defendants in this action are or at times pertinent to this action were manufacturers of asbestos or products that contained asbestos. All of the Defendants in this action placed their asbestos-laced products in the stream of commerce.

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ORIGINAL

## **Personal Jurisdiction Issue**

The question of personal jurisdiction in this case should be controlled by *Abuan v. General Electric Co.*, 735 F. Supp. 1479 (D. Guam 1990).<sup>1</sup> The case dealt with PCBs placed in the stream of commerce by Monsanto Co. The Defendants are brought before a Guam court pursuant to the Territory's long arm statute. 7 GCA § 14109.

As with the Defendants herein, Monsanto put PCBs “into the stream of commerce through industrial buyers who, having used PCBs in their products, distributed them throughout the globe. All of Monsanto’s distribution of PCBs into ultimate use was therefore indirect. … Monsanto does not and never has had any direct contacts with Guam which relate to PCBs.” *Abuan, supra*, 735 F. Supp. at 1481.

While the *Abuan* court recognized that it did not have “general jurisdiction” in the matter, it found that it did have “limited” or “specific” jurisdiction because the defendant’s contacts with the forum, though limited, were sufficiently related to the cause of action. Limited or specific jurisdiction exists as to the specific claims of the case even where they may be insufficient contracts for general jurisdiction. *Data Disk v. System Technology Associates*, 557 F.2d 1280, 1287 (9<sup>th</sup> Cir. 1977).

The *Abuan* court turned to Justice Stevens concurring opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 US 102, 122, 107 S.Ct 1026, 1038 (1987) to explain its rationale for finding that the case against the defendants could be tried in Guam:

Thus, Justice Stevens frames a test which satisfies the concerns of the entire Court. He requires that there be a stream-of-commerce *plus*, as Part II-A in *Asahi* argues, but requires only that the *plus* be a *reasonable* expectation of being subject to jurisdiction in the forum State. [Emphasis in original.]

*Abuan, supra*, 735 F. Supp. at 1486.

<sup>1</sup> The Defendants were ultimately granted summary judgment, but not on a jurisdictional question. *Abuan v. General Electric Co.*, 1992 WL 535958 (D. Guam 1990), *aff'd* 3 F.3d 229 (9<sup>th</sup> Cir. 1993), *cert. denied*, 510 US 1116, 114 S.Ct. 1064 (1994).

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1           The *Abuan* court also found significant a case that closely parallels the circumstances of  
2 the parties in this action, holding:

3           Finally, while this Court finds the Supreme Court's position on the requirements  
4 of minimum contacts to clearly sanction the present analysis, the split [in the  
5 *Asahi* decision] justifies reference to the Ninth Circuit's position on the issue.  
6 This position is manifested in *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9<sup>th</sup> Cir.  
7 1983), where the Circuit held that a defendant purposely avails itself of a forum if  
8 it injects its products into the stream-of-commerce without more. In that case, the  
9 Ninth Circuit looked to the volume of sales and the expectation of a producer who  
10 sold "splices" to ocean-going vessels without notice of their ultimate destination.  
11 "Daiko performed a forum-related act when it produced a splice that it knew was  
12 destined for ocean-going vessels serving United States ports, including those of  
13 Oregon. *Id.* 715 F.2d at 1358. Like Monsanto, the producer's reasonable  
14 expectation was not one of local use. "The probability that the part sold to an  
ocean carrier will be used in a foreign port is not fortuitous. It is certain." *Id.*  
The Court distinguished the World-Wide Volkswagen situation where a retailer  
sold cars in the northeastern United States to consumer in such quantity that his  
reasonable expectations did not justify being sued in Oklahoma. *Id.* Thus,  
*Hedrick* not only manifests the Ninth Circuit's accord with the Brennan plurality  
in *Asahi*, but is based on facts so similar to the present case as to command the  
result reached here.

15           *Id.*, 735 F.Supp. at 1487.

16           Just as in *Abuan*, the Defendants herein distributed their products worldwide knowing that  
17 whether they distributed their merchandise directly to Guam or through manufacturers who  
18 incorporated the asbestos into their products, they benefited through sales that reached the very  
19 place the Plaintiffs were employed. "This amounts to the deposit of its components into the  
20 stream-of-commerce *plus* the reasonable expectation that it would be haled into Court there by a  
21 user of its products. The result comports with 'fair play and substantial justice,' and might serve  
22 as its paradigm." [Emphasis in original.] *Id.*

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## Venue Issue

The motion to dismiss this action on the basis of improper venue is premature.

The Plaintiffs are citizens and residents of the Philippines who are aged and in declining health because of their alleged exposure to the products of the Defendants. It is correct that the Plaintiffs have alleged that the exposure occurred while they were serving on ships and employed on bases operated by the United States Navy throughout the Pacific. At some time, according to ¶ 9 of the Complaint, the Plaintiffs were employed on ships calling at Guam.

Logically, given their place of residence and their frail physical condition, the Plaintiffs have initiated their action in the United States District Court that is closest to their homes.

To begin with, the Defendants have not suggested a better venue for the action to be heard. They offer the Court no guidance on an appropriate alternative to the District Court of Guam. Yet the statute permitting a change of venue, 28 USC § 1404, assumes there must be another court where the case may be heard, stating in subparagraph (c):

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

To prevail on a motion to transfer venue under § 1404, “the defendant must show by a preponderance of the evidence that the proposed transfer will better and more conveniently serve the interests of the parties and the witnesses and better promote the interests of justice.” *Helsel v. Tishman Realty Constr. Co., Inc.*, 198 F.Supp.2d 710, 711 (D.Md.2002) (internal quotations omitted). See also *Lynch v. Vanderhoef Builders*, 237 F.Supp.2d 615, 617 (D.Md.2002); *Dicken v. U.S.*, 892 F.Supp. 91, 92 (D.Md.1994).

In order to satisfy its burden on a motion to change venue, a defendant should submit affidavits from witnesses and parties involved that explain the inconvenience and hardship the defendant would experience if the case were heard in the plaintiff's chosen forum. *Dow v. Jones*, 232 F.Supp.2d 491, 499 (D.Md.2002). Mere claims of inconvenience, without more, will not

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justify a motion to dismiss or to transfer pursuant to § 1404(a). *See Dow*, 232 F.Supp.2d at 499; *Helsel*, 198 F.Supp.2d at 712.

At this very incipient stage of the proceedings, the motion to change venue should be deferred pending discovery. The Plaintiffs believe that with discovery they can satisfy any concern that the Court may have relative to it being the appropriate forum for this action. Deferral under these circumstances is not unusual. *In re National Student Marketing Litigation*, 413 F.Supp. 1159, 1161.

## **Conclusion**

For the reasons stated, the Plaintiffs respectfully pray that the Court deny the Defendants' motions to dismiss for lack of personal jurisdiction and for lack of an appropriate forum.

Dated this 3<sup>rd</sup> day of January 2006.

Respectfully submitted,

## **LUJAN AGUIGUI & PEREZ LLP**

By:

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*Attorneys for Plaintiffs*

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## **DECLARATION OF SERVICE**

I certify that I caused a copy of the PLAINTIFFS' OPPOSITION TO MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FOR IMPROPER VENUE to be served, via hand delivery, upon the below named counsel on the 3<sup>rd</sup> day of January, 2006.

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38          *Cess Navarro Olmo and Ronnie Pascual Ferreras*  
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40          Civil Case 05-00025

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